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Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

STANDARD FRUIT AND STEAMSHIP COMPANY, *Petitioner,*

v.

UNITED FRUIT COMPANY and
UNITED STATES OF AMERICA, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNITED FRUIT COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court, in administering an anti-trust consent judgment which provides for the creation of a new company to compete in the importation and sale of bananas, exceeded its authority or abused its discretion by declining to make available to petitioner, which is not a party to the litigation and which will be

a major competitor of the new company, reports disclosing the confidential, competitive plans and programs of the new company.

STATEMENT OF FACTS

This appeal is an offshoot of a civil antitrust action brought in 1954 by the United States against respondent United Fruit Company ("United"). A single judge was designated in 1956 to hear the case and since that time has handled all aspects of the litigation. After extensive discovery but before trial, the antitrust suit was settled in 1958 by entry of a consent judgment. This judgment required, among other things, that United either sell certain banana properties to an eligible person or use them to establish a new, independently owned company of specified size in the banana market to provide additional competition to existing companies. The judgment further provided that United submit to the District Court a plan for accomplishing one of these alternatives (A. 60-64).[1]

On May 14, 1958, shortly after the entry of the consent judgment, the District Court on motion of United entered a protective order providing that persons not parties to the antitrust suit could not, without an order of the court issued after notice to the parties, inspect or copy documents filed with the court (A. 69-71). The order was sought in order to prevent indiscriminate disclosure of detailed confidential commercial information that United had been required to file with the court.

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[1] "A." refers to the appendix to the briefs filed in the Court of Appeals which constitutes volume I of the transcript of record in this Court. "Pet." refers to the certiorari petition and annexed materials.

Pursuant to the antitrust judgment on July 1, 1967, United filed a plan for creating a new company which would take over various banana properties of United and whose stock would ultimately be distributed to United shareholders as contemplated in the judgment (A. 71). The District Court approved the plan, and United thereafter organized the Sovereign Fruit Company ("Sovereign"). The plan also called for the filing with the District Court of periodic progress reports concerning Sovereign and two specific "detailed programs" the first of which was to cover the "initial organization, staffing, production, shipping, marketing, and other arrangements" for Sovereign (A. 71-73). In compliance with the provisions of the plan United has filed the regular progress reports and the initial "detailed program" and will file the second "detailed program" on July 28, 1969.

On July 2, 1968, petitioner Standard Fruit and Steamship Company ("Standard")—which was not a party to the antitrust suit—moved the District Court to allow Standard to inspect and copy the progress reports and programs submitted under the plan (A. 73). Standard is the second largest banana importer in this country and is a subsidiary of Castle & Cooke, a very large conglomerate corporation.[2] Standard is one of the companies against which Sovereign is intended to compete under the antitrust judgment, and the judgment expressly forbade United from transferring to Standard any interest in or assets destined for Sovereign (A. 61-63). As the Court of Appeals stated,

[2] As shown in an affidavit submitted by United to the District Court (A. 88), by most criteria Castle & Cooke is fairly comparable to United in size and strength and substantially more powerful than Sovereign will be.

the purpose of Standard's motion was "admittedly one of self interest to obtain advance information about the proposed competitive plans, practices and policies of Sovereign" (Pet. 17). In response to the motion, United filed affidavits including one by the President of Sovereign which described in detail the harmful competitive consequences to Sovereign that would ensue if Standard's request for one-sided disclosure were granted (A. 81-85).[3]

The District Court after argument on Standard's motion entered an order denying the motion without prejudice to its renewal in the future (Pet. 24-25). The order stated in part that the reports and programs relating to Sovereign contain confidential commercial information about its proposed operations, that disclosure would give Standard a competitive advantage since Standard cannot be required to provide comparable information to Sovereign, and that the purposes of the antitrust judgment and the public interest would not be served by granting the motion (Pet. 24-25).

Standard appealed to the Court of Appeals for the Fifth Circuit,[4] arguing that the District Court had exceeded and abused its authority. The United States, which had supported Standard's motion in the District Court, filed a memorandum on appeal urging affirmance because the matter was within the District Court's discretion and there was no abuse of that discretion

[3] In support of its motion Standard alleged that Sovereign sought to "raid" Standard by hiring away an employee (A. 75). While the relevance of such allegations is unclear, an affidavit submitted by the employee established that his job with Sovereign was arranged upon his own initiative (A. 86).

[4] Attempts by Standard to obtain direct review in this Court by mandamus and direct appeal were rejected. 393 U.S. 974 (1968); 393 U.S. 406 (1969).

warranting reversal. The Court of Appeals unanimously affirmed the District Court (Pet. 15). Its opinion concluded that the District Court "unquestionably" had authority to enter its order, that the exercise of this discretion was a matter for the trial judge particularly since that judge was intimately familiar with the case, and that his discretion "was in fact exercised wisely" in this instance (Pet. 21-23).

REASONS FOR DENYING THE WRIT

The decision of the District Court, unanimously affirmed by the Court of Appeals, does not deserve review by this Court on certiorari. The authority of the District Court to enter protective orders in antitrust cases to safeguard commercial information is well established and is not in conflict with any case or statute. The District Court's discretionary exercise of that authority should not be disturbed by an appellate court in the absence of clear abuse and, in any event, the District Court exercised its authority correctly on the present facts.

I

The District Court unquestionably possessed the power to withhold from nonparties such as Standard the reports and other documents filed with it in the antitrust litigation. This authority derives from the inherent equitable powers of courts and has been exercised to seal all or part of the record in civil actions where, as here, it contains private commercial information that would benefit competitors. *International Prods. Corp.* v. *Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963); *Baim & Blank, Inc.* v. *Bruno-New York, Inc.*, 17 F.R.D. 346, 349 (S.D.N.Y. 1955); see 1 Moore, *Federal Practice* ¶ 0.60[6] (2d ed. 1964). Courts in

a number of antitrust actions have made comparable orders under the Federal Rules of Civil Procedure [5] sealing or limiting use of confidential material furnished during discovery. *E.g., United States* v. *Standard Oil Co.*, 23 F.R.D. 1 (S.D.N.Y. 1958); *United States* v. *Lever Bros. Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

Standard wrongly suggests that the authority to seal court records exercised here is inconsistent with *Ex parte Uppercu*, 239 U.S. 435 (1915) and *Olympic Ref. Co.* v. *Carter*, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964). Both cases held that a trial court should not refuse access to materials covered by a protective order where such materials are required for use in other litigation, a situation not here presented. The decisions, as *Uppercu* made clear, 239 U.S. at 439-40, depend upon the principle that a party to litigation has an overriding right to obtain information relevant to his case. These decisions in no way support Standard's present effort to obtain information to be used not in litigation of its own but rather to give Standard a commercial advantage in private business competition.

Equally without merit is the alternative argument that the decision below offends congressional policy. The limitation on private proceedings in the Publicity in Taking Evidence Act (set forth at Pet. 19 n. 7) applies only to depositions and hearings and, as Standard implicitly concedes (Pet. 10), the statutory language does not even arguably extend to the materials

[5] The Federal Rules governing discovery provide explicitly that the court may order discovered material be kept confidential, *e.g.*, Fed. R. Civ. P. 30(b), but nondisclosure orders are not limited to such material. International Prods. Corp. v. Koons, *supra*, at 407-08.

involved here. If Congress had intended a policy of indiscriminate disclosure of the kind Standard attributes to it, the statute could easily have been drawn to cover all antitrust records and proceedings. In fact, as its complete legislative history shows, the statute was a response to the Attorney General's request that antitrust testimony be taken in public so that the resulting publicity might attract witnesses to support the Government's case. Annual Report of the Attorney General 21-22 (1912); 49 Cong. Rec. 2511-12, 4626-27 (1913).[6]

II

The District Court's exercise of its discretionary power to seal documents turns upon the particular facts of the case. In this instance the trial judge made his decision in the context of experience gained in more than twelve years of supervising the present complex antitrust suit. Such an exercise of discretion should not be overturned by appellate court except upon a clear showing of abuse of discretion. *A. H. Robins Co.* v. *Fadely,* 299 F.2d 557, 561-62 (5th Cir. 1962); *Covey Oil Co.* v. *Continental Oil Co.,* 340 F.2d 993, 999 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965). Certainly after full review by the Court of Appeals there is no basis for a second appellate review through the certiorari jurisdiction, which is reserved for cases of general importance.

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[6] The petition also refers to a House Committee's concern that potential consent decrees be subject to advance comment by private victims because their entry avoids the statutory prima-facie case provided by a judgment on the merits against an antitrust violator. Such a policy of advance comment, adopted by the Justice Department in 28 C.F.R. § 50.1 (1969), relates only to "proposed consent decrees" and obviously does not imply any right of Standard to post-decree information for competitive use outside of court proceedings.

Furthermore, as the Court of Appeals found, the trial court's discretion was in fact exercised wisely. Sovereign is being created under court decree to provide new competition in an industry where Standard is the second largest company. The harm to Sovereign's business that would be caused by the unilateral disclosure sought by Standard was established in a detailed affidavit (A. 83) which Standard never sought to controvert.[7] Providing Standard advance information about the plans and prospects of its far smaller new competitor could only work against the success of this new entry into the market and thus frustrate the basic aim of the antitrust judgment itself.[8]

Standard submits that the reports it seeks should be disclosed because its comments might be useful to the District Court in administering the antitrust judgment.[9] This supposed advantage must be considered

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[7] In view of Standard's failure to controvert the affidavit and its admitted purpose to use the information in the reports for its own competitive purposes (Pet. 17; A. 76), its attempt to dismiss the possibility of misuse of the information as a mere "hypothetical possibility" (Pet. 13) does not deserve serious consideration.

[8] As an inevitable consequence of establishing Sovereign, United itself becomes familiar with Sovereign's operations but (1) United is under continuing court control, as Standard is not, and (2) United has a unique stake in the success of Sovereign since the latter's stock is to be distributed to United shareholders.

[9] Standard's further suggestion that it should be permitted to inspect in advance Sovereign's competitive plans and programs because the consent judgment "was intended" to protect "smaller competitors" (Pet. 2, 13) misstates the purpose of the judgment. The judgment was intended to create and protect competition, not particular competitors. See Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). It was certainly not intended to put Standard in a position where it would know in advance of every competitive step proposed to be taken by the fledgling company whose creation the judgment directs.

in light of the facts that Standard is seeking information not about the basic design of the consent judgment or the plan for divestiture (which has already been approved by the court) but about the details of the competitive plans and programs Sovereign will pursue once it is independent of United and that Standard's avowed purpose in seeking this disclosure is to advance its own competitive position (Pet. 17; A. 76). In all events, it is obviously for the District Court to weigh the alleged advantage in having Standard's comments against the disadvantage that disclosure will impair Sovereign's prospects of success and thereby thwart the purposes of the antitrust judgment. Under the express terms of its order here (A. 94), the question of nondisclosure can always be reopened and disclosure made to Standard if and when it will serve public purposes rather than Standard's own private gain.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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